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No. 88-1912

In the

Supreme Court of the United States

OCTOBER TERM, 1988

Edward Little ..... *Petitioner*

V.

A. L. Lockhart, Director,
Arkansas Department of Correction ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, A. L. LOCKHART, responds to the petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

JURISDICTION

Respondent acknowledges that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

I.

A MINOR HAS THE LEGAL CAPACITY TO WAIVE HIS RIGHTS.

Little argues that a minor does not have the legal capacity to waive constitutionally or statutorily guaranteed rights in criminal cases. In this case, Little, who was sixteen at the time, waived his right to a direct appeal from his conviction for capital murder upon which he was sentenced to life imprisonment without parole. Little refers to the disabilities faced by minors in a civil context in Arkansas and most other jurisdictions concerning such things as the capacity to enter into a contract, the capacity to make a valid will, and the capacity to sue and be sued, etc. He suggests that because a minor cannot act on his own behalf in a civil context, public policy should not permit a minor to waive constitutionally or statutorily guaranteed rights in a criminal context without the assistance and advice of a guardian.

At his trial, Little was represented by two appointed attorneys, Charles Hicks and Richard O'Brien. At the evidentiary hearing held before the United States Magistrate, Hicks and O'Brien testified that Little never wanted to appeal his conviction. However, a notice of appeal was filed by them over Little's objections. The attorneys hoped that Little would change his mind and agree to an appeal. O'Brien moved from Arkansas before the appeal was dismissed and had no further involvement in the case. Hicks testified that the decision to dismiss the appeal was Little's decision and was against his advice. Mark Riable, a law clerk working for Charles Hicks, confirmed that Little had never wanted to pursue on appeal. Their testimony is corroborated by the record in this case. At the time that the decision was made by Little to dismiss his appeal, Little

signed an affidavit stating that he wanted to withdraw his appeal. Moreover, when Mr. Hicks filed the motion with the Arkansas Supreme Court to dismiss Little's appeal in July, 1981, he stated in the motion that the appeal had been filed over Little's objections and that the appeal was being dismissed at Little's request.

There was testimony offered at the evidentiary hearing from Little and witnesses on his behalf to the effect that Little's attorneys advised him to dismiss his direct appeal and indicating that Little had been told that if he prevailed in the appeal and got a new trial, he could face the death penalty at a subsequent trial. Little claimed that this was primarily why he dismissed his appeal. However, the attorneys disputed this testimony. Hicks and O'Brien testified that they did not advise Little that he could face the death penalty if he won a new trial as a result of his appeal. Hicks made it clear that he was aware of the case of *Bullington v. Missouri*, 451 U.S. 430 (1981) (holding that the sentencing authority's rejection of the death penalty at a trial constitutes an acquittal and that double jeopardy attaches to prevent the State from seeking the death penalty at a subsequent trial), and that he told Little if he won a new trial he could not get any worse a sentence than he had already gotten at his first trial. Riable confirmed that Little was told he had nothing to lose by pursuing an appeal. The Magistrate credited the lawyers' testimony and rejected that of Little and his witnesses on this issue. The District Court concurred in these credibility findings and the Eighth Circuit affirmed because the findings were not clearly erroneous.

The Magistrate and the District Court applied a totality-of-the-circumstances test in resolving the question of whether Little had made a knowing and intelligent waiver of his appeal. The Magistrate indicated that he was relying on the authority of *Rone v. Wyrick*, 764 F.2d 532 (8th Cir. 1985) and the factors outlined in *Smith v. State*, 286 Ark. 247, 691 S.W.2d 154 (1985), in resolving the question of

whether Little had made a knowing and intelligent waiver of his appeal.

In *Rone v. Wyrick*, *supra*, the Eighth Circuit, reviewing the denial of a habeas corpus petition, applied the totality-of-the-circumstances test in resolving the question of whether a juvenile's waiver of his privilege against self-incrimination had resulted in a due process violation. In *Rone*, the Eighth Circuit relied on this Court's opinion in *Gallegos v. Colorado*, 370 U.S. 49, 55 (1962) in applying such a standard.

In *Smith v. State*, *supra*, the Arkansas Supreme Court applied the totality-of-the-circumstances test and relied on the following factors in reviewing the voluntariness of a confession taken from a sixteen-year-old: age, education, and intelligence of the accused, lack of advice as to his constitutional rights, length of detention, repeated and prolonged nature of questioning, or the use of physical punishment.

The evidence in Little's case establishes that at the time his appeal was dismissed, Little was sixteen years old and had a seventh grade education. Although Little claims that he could not read very well in 1981, the record shows that the attorneys for Little provided him with books at his request to read while he was in jail and at the State Hospital awaiting trial. Charles Hicks was certain that Little could read because they talked about the books. Richard O'Brien also testified that he believed Little was literate.

The attorneys made it clear that at the trial and at the time the appeal was dismissed Little appeared to understand what was going on around him. He corresponded with them in a coherent fashion. Yet, his attitude from before the time of his trial was fatalistic. He did not want to even go forward with the trial. He preferred to plead guilty because he was guilty and had confessed. However, the prosecutor would not plea bargain and

Little's attorneys convinced him that he had nothing to lose by going to trial. Hicks was certain that Little had been explained his rights regarding an appeal and that he understood them. Moreover, Little had been evaluated prior to his trial by the Arkansas State Hospital and independently by Dr. Doug Stevens on behalf of the defense and had been found competent to stand trial.

Thus, the only factor that remotely suggests that Little was not able to knowingly and intelligently waive his appeal was whether he could read in 1981. The Magistrate and the District Court rejected Little's evidence that he could not read. However, even if it had not, this factor alone would not make his decision to waive his appeal unknowing and unintelligent.

The respondent acknowledges that the Constitution guarantees minors due process and fundamental fairness. *See Fare v. Michael C.*, 442 U.S. 705 (1979); *In re Gault*, 387 U.S. 1 (1967). However, the respondent is aware of no jurisdiction in which a minor may not waive a right guaranteed to him if the circumstances indicate that the waiver is voluntary, i.e. that the defendant is competent to waive his right and his decision is knowing and intelligent based on the totality of the circumstances. Such an approach would appear to be consistent with the opinions of this Court. *Fare v. Michael C., supra; In re Gault, supra; Gallegos v. Colorado, supra; Johnson v. Zerbst*, 304 U.S. 458 (1938).

Despite Little's plea that public policy requires something more to legitimize a waiver of any right by a minor defendant in a criminal case than is presently required, he cites no authority in support of his position, no split of authority on this issue, nor indicates any significant inconsistencies among the various jurisdictions of this country in handling waivers by minors in criminal cases. Certainly he has failed to demonstrate that this issue has been percolating in the lower courts such that it is now ripe

for review. And, although he contends that it is anomolous that a minor would be permitted to waive his right to an appeal but would be required to have the assistance and advice of a guardian if someone was about to force the sale of a piece of real property in which he had an interest, his argument ignores the role of counsel and the courts in criminal cases.

Little has simply failed to identify any basis upon which this Court should exercise its certiorari jurisdiction in this case. Therefore, the respondent urges this Court to deny his Petition for a Writ of Certiorari.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on Writ of Certiorari will only be granted when there are special and important reasons therefor. This case contains no issues worthy of such review. The points raised by the petitioner do not establish that Constitutional error has occurred. Therefore, for these reasons and for the reasons and authorities cited in Respondent's Brief in Opposition to the Petition for Writ of Certiorari, respondent respectfully prays that this Court deny the petitioner's Writ of Certiorari.

Respectfully submitted,

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